Dilene Answering Service, Inc. *and* **United Telephone Answering and Communications Service Union, Local 780, Retail, Wholesale and Department Store Union, AFL-CIO.** Cases 2-CA-16218, 2-CA-16219-2, 2-CA-16403-1, 2-CA-16403-2, and 2-CA-16968

July 28, 1981

DECISION AND ORDER

On February 25, 1981, Administrative Law Judge Eleanor MacDonald issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order, as modified herein.[1]

Respondent, as its name implies, operates an answering service. The majority of its employees are telephone operators who receive and deliver telephone messages for Respondent's customers. Respondent's operation is open 24 hours a day, 7 days a week. United Telephone Answering and Communications Service Union, Local 780, Retail, Wholesale and Department Store Union, AFL-CIO, was certified on December 28, 1977, as the collective-bargaining representative of a unit of all of Respondent's employees, excluding guards and supervisors as defined in the Act. Thereafter, Respondent refused to bargain with the Union. On July 25, 1978, the Board issued a Decision and Order in which it granted summary judgment to the General Counsel and refused to reconsider Respondent's contentions concerning the validity of the certification.[2] The Board further ordered Respondent to negotiate with Local 780.

In the meantime, Respondent's employees went on strike from April to August 1978. The Administrative Law Judge found that Local 780 and Respondent commenced collective-bargaining negotiations in May and that in June Respondent proposed a 35-cent-per-hour wage increase for the first year of the contract.[3] The Union made a counterproposal of 50 cents per hour and Respondent replied with the same proposal of 35 cents. Although the parties met at least 15 more times after June, Respondent never changed its original June proposal.[4] The final meeting between the parties before Respondent took the action which is at issue here was in October. Thereafter, on December 15 the attorney for the Union wrote Respondent's attorney and discussed in detail most of the bargaining items still open between the parties. In the letter, the Union referred to the five major items—one of which was wages—which remained open, and stated:

> [I]t is the union's intention and desire to resolve them. It would hope that you would meet with us at your earliest opportunity so that we may resume the process [of collective bargaining].

On the same day the Union sent this letter, Respondent sent the union president a mailgram in which it stated:

> Please be advised that we propose, consistent with our wage proposal, to implement a thirty five cents (35 cents) per hour wage increase to all Dilene employees having 1 year or more seniority with the company, effective with the payroll period commencing December 25, 1978.
>
> If we do not hear from you by the close of business on December 22, 1978, we shall assume that you have no objection to the above proposal and we shall act accordingly.

The Administrative Law Judge found that the mailgram was the only notice given to the Union that Respondent intended, during the ongoing negotiations between the parties, to implement its original wage proposal. While the Union claimed that it never received the mailgram, the Administrative Law Judge found, on the basis of both testimony from Respondent that it had been mailed and an evidentiary presumption that a mailgram is normally properly received, that the mailgram was in fact received. The Administrative Law Judge assumed that the mailgram was received no later than December 18 and that, therefore, the Union had had 5 business days in which to respond to the proposal. When the Union did not respond, Respondent implemented the wage increase on or about December 27.

The Administrative Law Judge found that the parties had not reached an impasse in bargaining at the time the wage increase was granted. The Ad-

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

We have modified the Administrative Law Judge's notice to conform with her recommended Order.

[2] *Dilene Answering Service, Inc.*, 237 NLRB 155 (1978).

[3] All dates hereinafter refer to 1978 unless otherwise stated.

[4] Earlier Respondent had proposed a wage rate which was lower than 35 cents per hour.

ministrative Law Judge concluded, however, that the Union had sufficient notice of the wage change and that the mailgram indicated Respondent's willingness to discuss the issue of the wage increase. The Administrative Law Judge therefore found that Respondent had satisfied its duty to bargain and that the imposition of the wage increase did not violate Section 8(a)(5) and (1) of the Act.

We find merit to the General Counsel's exception and conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a wage increase while it was engaged in ongoing collective bargaining with the Union.

In *Winn-Dixie Stores, Inc.*, 243 NLRB 972, 974–975 (1979), we recently restated our understanding of the duty to bargain, as defined by the United States Supreme Court in *N.L.R.B.* v. *Benne Katz, et al., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962). In *Winn-Dixie* we stated:

> Bargaining presupposes negotiations—with attendant give and take—between parties carried on in good faith with the intention of reaching agreement through compromise. . . .
>
> Clearly this duty requires more than going through the motions of proffering a specific bargaining proposal as to one item while others are undecided and merely giving the bargaining agent an opportunity to respond. Such tactics amount to little more than a ritual or *pro forma* approach to bargaining and hardly constitute the "kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement."

A respondent must do more than merely give notice and an opportunity to bargain; its conduct must reflect an intention to reach agreement. Otherwise "form, rather than substance, becomes the determinative factor in deciding whether the bargaining obligation has been fulfilled." (243 NLRB at 974.) The result is ritualistic, *pro forma* bargaining without a meaningful exchange.

In the instant case, Respondent has engaged in ritualistic, *pro forma* bargaining which does not satisfy the requirements of Section 8(a)(5) of the Act. Thus, its conduct here showed that it was not intent on reaching an agreement with the Union on wages prior to implementing a wage change. First, Respondent deviated from the normal bargaining procedure which had been arrived at by the parties. Instead of discussing its proposal at a regular bargaining session it sent the Union a formal mailgram stating its firm intention to grant the increase. The mailgram also established a rigid and relatively short timetable for the Union's response which was not characteristic of past negotiation. This conduct is not consistent with a bona fide desire for good-faith negotiation; it is consistent with going through the motions of bargaining merely as a *pro forma* predicate to implementing a predetermined decision.

Our conclusion is reinforced by Respondent's failure to respond to the Union's letter of December 15.[5] The letter clearly stated the Union's desire to meet and negotiate about all open matters, including wages. Respondent admitted it received the letter around the time it made its own proposal. Yet it never responded to it. Instead, Respondent waited for a specific response to its mailgram and, when it received none, it implemented the increase. On the basis of all of the foregoing, we find that Respondent failed to satisfy its obligation to bargain with the Union prior to granting the wage increase. Rather, we find that Respondent refused to bargain with the Union as the exclusive representative of the unit employees by unilaterally granting a wage increase and that by so doing Respondent violated Section 8(a)(5) and (1) of the Act.[6]

AMENDED CONCLUSIONS OF LAW

Insert the following as new Conclusion of Law 7 and renumber the present Conclusion of Law 7 as Conclusion of Law 8:

"7. By refusing to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all its employees in the appropriate unit, by, on or about December 25, 1978, unilaterally granting a wage increase, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act."

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[5] The Union sent the letter on the same day Respondent sent the mailgram, so neither was aware of the other's correspondence when composing its own. The Union's letter was not considered by the Administrative Law Judge in her Decision.

[6] The General Counsel has also excepted to the Administrative Law Judge's finding that Respondent did not violate Sec. 8(a)(5) and (1) of the Act when it implemented a change in the holiday work schedule after notifying the Union of its proposed change and giving the Union a reasonable opportunity to respond. After careful consideration of all of the relevant evidence, we adopt the conclusion of the Administrative Law Judge but solely on the basis that the unilateral implementation of the schedule was justified by business necessity.

Scheduling, especially for holidays, is particularly difficult for Respondent since it is open for business 24 hours a day, 7 days a week. Around Christmas three operators had quit because of the method of scheduling holiday work. In order to avoid a similar problem at Eastertime, Respondent proposed changes in the method of scheduling at a regular bargaining session on March 27, 1979. It told the Union it wished to implement the new schedule for Easter weekend. Although the Union told Respondent it would give it a response to the proposed changes, it never did so. Finally Respondent implemented the new schedule in order to assure adequate coverage for Easter weekend. We find that these changes were justified by business necessity. *N.L.R.B.* v. *Katz*, 369 U.S. at 747. See also *New York Mirror, Division of Hearst Corporation*, 151 NLRB 834, 841 (1965).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Dilene Answering Service, Inc., Spring Valley, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as new paragraph 1(b) and reletter the subsequent paragraphs accordingly:

"(b) Making unilateral wage increases, in derogation of its bargaining obligation, to its employees represented by United Telephone Answering and Communications Service Union, Local 780, Retail, Wholesale and Department Store Union, AFL–CIO, in the appropriate bargaining unit described below; provided, however, that nothing herein shall require Respondent to vary such minimum salary schedules as are already established. The appropriate unit is:

> All full-time and regular part-time employees employed by Respondent at its facility located at 40 South Main Street, Spring Valley, New York, excluding guards and supervisors as defined in the Act."

2. Substitute the following for paragraph 2(a):

"(a) Upon request, bargain collectively in good faith with United Telephone Answering and Communications Service Union, Local 780, Retail, Wholesale and Department Store Union, AFL–CIO, including unit employees on the negotiating committee, as the exclusive bargaining representative of its employees in the appropriate unit."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT require our employees to remove union buttons from their clothing.

WE WILL NOT refuse to bargain collectively with United Telephone Answering and Communications Service Union, Local 780, Retail, Wholesale and Department Store Union, AFL–CIO, including unit employees on the negotiating committee, as the exclusive bargaining representative of our employees in a unit consisting of all full-time and regular part-time employees employed at 49 South Main Street, Spring Valley, New York, excluding guards and supervisors as defined in the Act.

WE WILL NOT unilaterally implement wage increases for employees in the bargaining unit described above without first engaging in good-faith collective-bargaining negotiations with United Telephone Answering and Communications Service Union, Local 780, Retail, Wholesale and Department Store Union, AFL–CIO, although this does not mean we are now required to lower any minimum salary schedules presently established for these employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL, upon request, bargain collectively in good faith with United Telephone Answering and Communications Service Union, Local 780, Retail, Wholesale and Department Store Union, AFL–CIO, including unit employees on the negotiating committee, as the exclusive bargaining representative of our employees in the appropriate unit.

DILENE ANSWERING SERVICE, INC.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge: This case was heard in New York, New York, on April 21, 22, and 24, 1980. The complaint, based on charges filed by Local 780, alleges that Respondent Dilene violated Section 8(a)(1) and (5) of the Act by (a) instructing an employee to remove a button signifying allegiance to Local 780, (b) unilaterally implementing a wage increase and a change in holiday scheduling, (c) refusing to meet and negotiate with Local 780 unless certain employees representing Local 780 were excluded, (d) refusing to make new proposals to Local 780 since November 1979, (e) refusing to meet and negotiate on January 23, 1980,

and (f) refusing to adhere to the established method of payment for the cost of meeting places.[1]

Respondent's answer denies certain of the material allegations of the complaint and denies that it has engaged in any unlawful conduct.

Upon the entire record, including my observations of the demeanor of the witnesses and after due consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Dilene, a New York corporation, maintains its principal office and place of business in Spring Valley, New York, where it operates a telephone answering service. At all times material herein, Respondent and Pintard Telephone Exchange, Inc., Answering Yonkers, Inc., and Answering Orange, Inc., have been affiliated business enterprises with common offices, ownership, directors, management, and supervision and have formulated and administered a common labor policy affecting employees of the aforementioned operations. By virtue of its operations, Respondent and the aforesaid corporations, which constitute a single, integrated business enterprise and a single employer, annually derive gross revenue in excess of $500,000 and annually purchase and receive goods and materials valued in excess of $50,000 directly from States of the United States other than the State in which Respondent's facilities are located. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that United Telephone Answering and Communications Service Union, Local 780, Retail, Wholesale and Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union Button Incident*

Josephine Migliorese, a telephone operator employed by Dilene from 1973 to 1978, testified that she participated in the strike of Respondent's employees which took place from April to early August 1978. On August 22, 1978, when she was apparently late in returning to work from her lunchbreak, Kenneth Iscol, president of Respondent Dilene, approached her outside Respondent's premises, stated that he could fire her for being late although he did not intend to do so, and asked her to remove a button she was wearing. The button read: "I Don't Scab," and Iscol said he did not want the button in his office. Migliorese removed the button and did not wear it thereafter. Iscol did not testify concerning this incident.

The General Counsel contends that Iscol's conduct carried the clear implication that he would enforce work rules strictly if his employee did not remove the union button, and thus restrained and coerced the employee in violation of Section 8(a)(1) of the Act, citing *Freightmaster, A Division of Halliburton Services*, 186 NLRB 3 (1970). Counsel for the Charging Party similarly asserts that the wearing of a button is a protected activity and that any interference therewith is a violation of the Act. Counsel for Respondent urges that Iscol's comment to Migliorese was an isolated noncoercive remark and should be considered "*de minimis*" and that the request was justifiable in that it was "obviously . . . intended to put strike-related events in the past."[3] Respondent also cites numerous cases which are discussed below.

The rule is clearly established that an employer violates the Act when it requires an employee to remove union insignia. *J. P. Stevens and Co., Inc.*, 163 NLRB 217, 233 (1967), affd. *sub nom. Textile Workers Union of America, AFL-CIO [J. P. Stevens & Co., Inc.]* v. *N.L.R.B.*, 388 F.2d 896 (2d Cir. 1967), cert denied 393 U.S. 836 (1968). Certain exceptions to this principle have been made where business requirements relating to a neat uniform or well-groomed appearance may be found to justify a no-button rule. *United Parcel Service, Inc.*, 195 NLRB 441 (1972). However, no evidence was presented in the instant case to support such a contention. In *John Rooney, et al., d/b/a Rooney's at the Mart*, 247 NLRB 1004 (1980), cited by Respondent, both the Board and the Administrative Law Judge found that the employer violated Section 8(a)(1) by instructing an employee to remove a union button, and further found that no special circumstances had been shown to justify the employer's conduct.

The other cases cited by Respondent's brief on this point do not involve the wearing of union insignia but rather deal with the proposition that certain conduct, while technically violative of the Act, does not warrant a remedial order. Thus, *American Federation of Musicians, Local 76, AFL-CIO (Jimmy Wakely Show)*, 202 NLRB 620 (1973), is a case where the Board held that a violation of Section 8(b)(1)(B) did not require a Board remedy because the conduct was minimal and had been "substantially remedied by Respondent's subsequent conduct" in withdrawing the threat. In the instant case, Iscol did not withdraw his request that the union button be removed. In *Metro Truck Body, Inc.*, 223 NLRB 988 (1976); *Walgreen Co., d/b/a Globe Shopping City*, 203 NLRB 177 (1973); *Fearn International, Inc., Eggo Foods Division*, 209 NLRB 232 (1974); and *Howell Refining Company*, 163 NLRB 18 (1967), the Board declined to issue remedial orders for violations of Section 8(a)(1) consisting of "trivial" or isolated questions about union activity or statements that benefits would be lost if the Union won the election. Those cases are not apposite to the facts herein. In this case, Iscol reminded Migliorese that he had the power to fire her for an infraction of the

[1] Certain other allegations were withdrawn by the General Counsel at the hearing.

[2] In *Dilene Answering Service, Inc.*, 237 NLRB 155 (1978), the Board asserted jurisdiction over Respondent and ordered it to bargain with Local 780 in a unit of all full-time and regular part-time employees employed by Respondent at its facility located at 49 South Main Street, Spring Valley, New York, excluding guards and supervisors as defined in the Act.

[3] However, I note that Iscol did not testify that this was his intent.

rules and then told her to remove her union button. He therefore conveyed the threat of an immediate job loss in connection with his order concerning the union insignia. This occurrence cannot be viewed as trivial, innocuous, or *de minimis*. I therefore find that Respondent restrained and coerced its employee in violation of Section 8(a)(1) of the Act.

B. *The Wage Increase*

I. Jerry Fischer, president of Local 780, testified on direct examination that the first bargaining session between the parties subsequent to the Board Order took place in September 1978, and that there were from four to six meetings from September to December 1978. Fischer testified that in January 1979 the employees of Respondent informed him that they had been granted a wage increase; Fischer stated that there had been no bargaining concerning this increase and he denied receiving any prior notification thereof. On cross-examination, Fischer changed his testimony and stated that there had been over 10 negotiation sessions with Respondent, and he acknowledged that there may have been as many as 15 meetings where wages and economic issues were discussed with Respondent by December 27, 1978. However, the institution of a wage increase by Respondent was not discussed. At first maintaining that no wage proposal had been made by Respondent before December 27, 1978, Fischer then testified that Iscol had spoken of a 3-year contract before that date with a wage increase of 35 cents an hour for the first year, 30 cents an hour for the second year, and 30 cents an hour for the third year, but that this was not an offer. Finally, when confronted with his sworn statement given to an agent of the National Labor Relations Board on March 1, 1979, Fischer admitted that his statement relates that Respondent made the 3-year contract offer on September 20, 1978, but Fischer stated that he could not recall the discussion at which the offer was made. During negotiations in December 1978 Fischer testified, the Union was demanding a 1-year contract with a wage increase of 50 cents an hour, a change from the Union's earlier request of $1 per hour. Fischer testified that by early December 1978, the parties had agreed on many provisions of a collective-bargaining contract although there were still some open items. Fischer was shown a confirmation copy of a mailgram dated December 15, 1978, sent by Iscol to Fischer at the union office which stated that "Dilene employees have not received a wage increase since October 1977," advised the Union that the employer proposed to implement a 35-cent-per-hour wage increase effective with the payroll period commencing December 25, 1978, and concluded: "if we do not hear from you by the close of business on December 22, 1978, we shall assume that you have no objection and shall act accordingly." Fischer denied receiving the mailgram. He testified that when he heard about the wage increase in January 1979 he did not call the Company nor object to the increase in any other way.

Iscol testified that negotiations began in May 1978, and that he first proposed a 35-cent-per-hour wage increase for the first year of the contract in discussion with Fischer in June 1978, and did not vary his wage offer thereafter.[4] He testified that he told the Union that he desired to give a wage increase "a number of times," and that the final notice to the Union was contained in the mailgram he sent to Fischer on December 15, 1978. Iscol stated that there had been between 20 and 25 negotiating sessions with the Union prior to December 15, 1978. He stated that he received no objections from the Union prior to implementation of the wage increase. On cross-examination, Iscol acknowledged that before sending the mailgram of December 15, 1978, he had not given notice to the Union that he intended to implement a wage increase.

The General Counsel argues that Respondent's unilateral grant of a wage increase to its employees was a refusal to bargain and violated Section 8(a)(5) of the Act. The General Counsel points out that there was no bargaining concerning the implementation of the wage increase and no agreement on the part of the Union. The General Counsel asserts that the parties were not at impasse because there had been movement on the wage issue and Respondent had not advised Local 780 as of December 1978 that an increase of 35 cents was its final offer or that it believed further bargaining would be futile. Further, the General Counsel argues, the Union did not waive its right to bargain over the wage increase. First, the General Counsel asserts that the Union did not receive the December 15 mailgram and thus cannot be charged with waiver of its contents. Second, even if it is found that the Union received the mailgram, the General Counsel contends that since the mailgram was sent on a Friday and could not have been received until Monday, December 18, the Union had insufficient time to reply and demand bargaining before Friday, December 22, 1978, citing *Metlox Manufacturing Company*, 225 NLRB 1317, 1325 (1976).[5] Finally, the General Counsel argues that the Union's failure to demand rescission of the wage increase after it was given does not constitute a waiver of its claim that the action was taken unilaterally.

Counsel for the Charging Party argues generally to the same effect, adding the contention that bargaining over a wage increase generally cannot be equated with bargaining over the proposed implementation of a wage increase.

Respondent argues that implementation of the wage increase was lawful. First, Respondent asserts that the parties had reached an impasse on the subject of wages and that Dilene could lawfully implement its last wage offer to the Union. Respondent contends that impasse had been reached because the parties had been bargaining since May 11, 1978, had met approximately 25 times, and had remained deadlocked on this issue of paramount importance for a long period of time. Even if no impasse is found to have existed on December 15, 1978, Respondent asserts that it offered the Union the opportunity to bargain concerning proposed implementation of the

[4] Earlier, Iscol had offered a lesser increase.

[5] There was no proof on the record as to how long mailgrams require for delivery, and thus it is impossible to say whether the mailgram could have been delivered earlier than December 18. Further, there was no proof concerning the Union's normal office hours.

wage increase but that the Union waived its rights by failing to object or to demand bargaining.

Before considering the legal issues, it is necessary to determine which of the versions of the negotiations proffered by Fischer and Iscol was correct. Because Fischer seemed to have an inexact, changeable, and incomplete memory, and because he was unable to recall events even when his recollection was refreshed by his prior sworn statements, I do not find that Fischer was a reliable witness. Further, I find that Iscol testified in a direct and forthright manner without seeking to evade cross-examination. Therefore, wherever there is a conflict in the testimony, I shall credit Iscol's recollection instead of Fischer's.

Although Respondent has made a strong argument to support a finding of impasse, I do not believe the facts support the conclusion that by December 15, 1978, the parties had reached an impasse in negotiations. The record shows that there were numerous bargaining sessions through December 1978, and that substantial agreement was reached on many issues. However, the facts do not show that further bargaining would have been futile or that no further movement could have been expected to result; indeed, there is nothing in the record on these issues. If Respondent had wished to meet its burden of showing that impasse existed, it should have adduced more evidence to show when the last significant concessions were made by the parties, what the tenor of the last negotiating session was, what were the exact discussions on the wage issue, and the like. In the absence of this type of detail, the record will not support a finding that further significant agreement was not likely.

Although the record shows that numerous bargaining sessions were held and that the parties had not varied their respective positions on wages for some time, the record does not contain the kind of specific detail necessary for a conclusion that impasse on the wage issue had indeed been reached. For example, there is no clear indication that the parties had abandoned any discussion of wages or what the substance of those discussions was if they still continued; there is no indication that the parties had told each other or behaved in such a way as to indicate that their positions were "final"; there is no indication that there was not substantial movement on other issues which might have motivated some movement on the wage issue. See, for example, *O'Malley Lumber Company*, 234 NLRB 1171 (1978); *American Federation of Television and Radio Artists, AFL-CIO, Kansas City Local [Taft Broadcasting Co.]* v. *N.L.R.B.*, 395 F.2d 622 (D.C. Cir. 1968). In sum, Respondent has not met its burden of showing that an impasse on wages existed.

The cases cited by Respondent support this conclusion; in those cases there are numerous facts recited which show that the parties had, for example, expressed a final offer, acknowledged that a strike was likely if the final offer was not acceptable or had made it clear that they would make no further concessions on the significant issues. See, for example, *Bi-Rite Foods, Inc.*, 147 NLRB 59, 65 (1964); *Alexander Typesetting, Inc.*, 207 NLRB 301 (1973).

Although I do not find that negotiations were exhausted on the issue of wages, I do find that the Respondent gave the Union sufficient notice of its intention to implement the wage increase it had been offering in negotiations and that the Union waived any protest thereto by failing to request bargaining over the matter.

Iscol testified that he sent the mailgram to Fischer on December 15, 1978, and a confirmation copy thereof was introduced into evidence. There is a presumption that the mailgram was properly delivered to the Union. 1 Jones On Evidence §3.42. Although Fischer testified that he had not received the mailgram and only saw a copy of it sometime in January, I have previously found that Fischer is not a reliable witness and I therefore do not find his recollection to be conclusive on this point. I therefore find that the mailgram was sent and was duly received by the Union. Assuming that the mailgram was received by the Union as late as Monday, December 18, 1978, there was still 1 whole week before the December 22 date suggested by Respondent in which the Union could have sought to bargain over implementation of the wage increase. Certainly, 1 business week is a sufficient length of time for the Union to have considered the mailgram and communicated with Respondent.

In *N.L.R.B.* v. *Benne Katz, et al., d/b/a Williamsburg Steel Products Company*, 369 U.S. 736 (1962), cited by the General Counsel, the Court, in footnote 12, distinguished an unlawful unilateral action by an employer from the situation where an employer "after notice and consultation, 'unilaterally' institutes a wage increase identical with one which the union has rejected as too low." The court cited *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F.2d 144 (7th Cir. 1951), in support of this proposition. This case held that it was not a violation of the Act for an employer to grant a wage increase where negotiations had not reached an impasse but where the employer had given notice of its intentions to the Union. The circuit court additionally observed at 192 F.2d 151 that the employer's notice to the employees when it granted the wage increase could not be perceived as undermining the Union.

In the instant case, Respondent gave the Union ample notice of its intention and indicated that it was willing to discuss the issue with the Union. The mailgram of December 15, 1978, does not suggest that the increase would be granted over the Union's objection. Further, the notice to employees dated December 27, 1978, which announced the increase stated that Iscol had "notified the Union of my desire to institute a wage increase," and a copy of the December 15 mailgram was attached. Thus Respondent's actions gave full recognition to the Union's role in negotiations and cannot be said to have disparaged the Union. Indeed, the mailgram recognizes the duty to bargain over wages and specifies that the action will be taken if there is no union "objection." Thus, I find that the granting of a wage increase did not violate the Act. *N.L.R.B.* v. *Katz, supra; A-V Corporation*, 209 NLRB 451 (1974). *Metlox Manufacturing Company, supra*, is not applicable to the facts in the instant case. There has been no finding, nor any claim, that Respondent engaged in a course of bad-faith bargaining prior to December 1978, and there can therefore be no finding

such as was made in Metlox that "to request further bargaining would be futile." 225 NLRB at 1325.

C. *Change in Holiday Schedules*

Iscol testified that traditionally holidays had been counted as belonging to one of two groups: The winter group consisted of Thanksgiving, Christmas, New Year's Day, and George Washington's Birthday and the summer group consisted of Easter, Memorial Day, 4th of July, and Labor Day. Employees in order of seniority chose 1 day out of each group on which they would work. However, after the strike in 1978, there was a reduction in customers and a 30-percent staff reduction; as a result, there was no longer sufficient staff to cover the holidays under the old scheduling system, and three low seniority employees resigned in late 1978 because they thought the scheduling system was unfair to them. Iscol testified that he explained this situation to the Union at a meeting on March 27, 1979. Iscol stated that, since Easter was about 2 weeks after the meeting, he asked the Union to discuss a solution to this problem.[6] The union representatives (Fischer and Dale Buckius, the Union's secretary-treasurer) told Iscol that they would talk to the unit employees and get back to Iscol. However, according to Iscol, he heard nothing further from the Union on the subject.

Miss Ethel Alfieri, an employee of Respondent, testified on direct examination that a notice was posted on the bulletin board before George Washington's Birthday in 1979, which changed the method of holiday scheduling. Instead of two groups of four holidays, there would now be two groups of three holidays: Easter and George Washington's Birthday would be excluded from the choice and would be worked mandatorily if they fell on an employee's regularly scheduled workday. Alfieri testified that she mailed a copy of the notice to the Union.

Iscol controverted Alfieri's testimony concerning the date of the posting of the notice; he stated that the schedule for George Washington's Birthday in 1979 was prepared before Thanksgiving in 1978 due to the system of holiday grouping then in force, and that there would have been no reason for the notice to be posted just prior to George Washington's Birthday in 1979. However, Iscol did not post the notice himself and he did not testify that he observed it on the bulletin board. Further, Iscol testified, he had checked with the payroll clerk and had been informed that the payroll records showed that Alfieri did not work on George Washington's Birthday in 1979. Iscol acknowledged that he had not discussed the notice at the meeting of March 27, 1979.

On direct examination, Fischer testified that the Union never bargained with Respondent concerning a change in holiday scheduling. On cross-examination, Fischer could not at first recall whether holidays had been discussed, but in response to questioning by counsel for Respondent, he acknowledged "it may have been discussed, so I'll say it was discussed, because I believe it was discussed. I'm not really sure. . . ." Fischer then averred that he could not recall informing Respondent that he would have to check with the employees about the changes, and then testified that he was to get back to Respondent about something other than holidays. However, Fischer did not specify what the other subject was. Fischer stated that although a change in the holiday schedules was discussed, he was not told the changes would be implemented. Finally, on redirect examination, Fischer acknowledged that Iscol had told him on March 27, 1979, that he wished to implement the changes in holiday schedules which had just been discussed with the Union, but Fischer stated no agreement on implementation had been reached. Fischer testified that the unit employees had informed him that a notice relating to holiday schedules had been posted; however, he did not place this at any specific time.

A review of this testimony shows that Iscol and Fischer agree that changes in holiday schedules were discussed at the negotiation session of March 27, 1979, that Iscol did tell Fischer he wished to implement the changes and that no firm agreement was reached. In view of my prior findings as to the relative reliability of testimony given by Fischer and Iscol, and in view of the tentative, unsure, and contradictory testimony given by Fischer on the issue of holiday schedules, I shall credit Iscol's version of the negotiations wherever Fischer has given a different version. Thus, I find that Iscol did request that the Union respond to his desire to implement changes and I find that Fischer promised to speak to the unit employees concerning this problem and get back to Iscol, but that he failed to do so.

As to the timing of the posting of the notice which changed holiday scheduling practices, I find that it was posted before Easter rather than before George Washington's Birthday as the testimony of Alfieri would have it. It is clear that Fischer heard of the notice from the employees right after it was posted, and it is also clear that the notice was not discussed at the March 27, 1979, meeting. Fischer would undoubtedly have raised the issue of the Employer's posting of such a notice at the meeting if it had already been done. Therefore, I find that the notice was posted after the meeting and after Fischer failed to "get back" to Iscol on the subject of implementing the scheduling change as he had promised.

An extended discussion of the General Counsel's arguments on this issue is not warranted since the General Counsel's brief is based on an erroneous view of the facts. I do note, however, that, contrary to the General Counsel's assertions, the charges filed by the Union on February 14, 1979, do not relate to changes in holiday schedules.

In conclusion, I find that Respondent negotiated the subject of changes in holiday scheduling practices with the Union and informed the Union that for practical reasons it wished to implement changes by Easter 1979, and I further find that, although the Union assured Respondent it would respond to the proposal, it failed to do so. Therefore, I find that the Union waived further bargaining or protest on the changes in holiday schedules and that it was not a violation of the Act for Respondent to implement the changes.[7]

[6] In 1979, Easter fell on April 15.

[7] *N.L.R.B.* v. *Katz, supra; A-V Corporation, supra.*

D. *Refusal To Meet and Negotiate*

On April 17, 1979, the parties met for negotiations at the Spring Valley Fire House. All the witnesses agree that Iscol entered the room and left immediately after a brief conversation in which he ascertained that in addition to Fischer and Mildred Sossi, vice president of Local 780, four unit employees were present in the room and were to remain for the bargaining session. Fischer testified that in response to Iscol's objections that the four employees had no right to be at the negotiations, he informed Iscol that the employees were part of the Union's committee and would participate in negotiations and that the employees had a right to attend, observe, and say what they pleased. Fischer acknowledged that he may have raised his voice to Iscol and may have called him a liar. Iscol testified that at the April 17, 1979, meeting the four unit employees told him that they were there to see and hear what was going on and that they were not representing the Union. Iscol told Fischer that he was not interested in holding a public meeting, and Fischer thereupon yelled at Iscol concerning various matters and concluded by telling Iscol that the people were there to see what a liar Fischer was. Iscol testified that after telling Fischer that he was prepared to meet in that location or any other location with union representatives, he left. On the way out, he met counsel for the Union, Jon Quint, who was just entering the premises. Iscol told Quint that he objected to negotiating with employees who were not union representatives. Quint replied that the employees were indeed union representatives. Iscol testified that he did not want to meet with the Union in a public meeting because he did not want Fischer to abuse him in the presence of his employees and because he did not want his employees to be exposed to the Union's "unreasonable" demands. Finally, Iscol testified that he had not objected to the presence of employees at other meetings because in those other instances he knew that the two employees present were a shop steward and an alternate.

The General Counsel urges that Iscol was not entitled to dispute the claim made by the union president and by union counsel that the four employees were part of the committee and were representing the Union in negotiations. Further, the General Counsel argues that Respondent has not met its burden to show that the presence of employees constituted a clear and present danger to the bargaining process. The General Counsel contends that Iscol's departure on April 17, 1979, constituted a refusal to bargain under the Act.

Respondent argues that the four employees present at the April 17, 1979, meeting were only observers and therefore were not true union representatives, and Respondent concludes that there was no duty to bargain in the presence of the employees. Respondent cites *L. G. Everist, Inc.*, 103 NLRB 308 (1953), and *Booth Broadcasting Co.*, 223 NLRB 867, 875 (1976).

As a general rule, either party to the collective-bargaining negotiations may be represented and assisted in the manner which it deems best. *General Electric Company* v. *N.L.R.B.*, 412 F.2d 512 (2d Cir. 1969). As Judge Feinberg said in that case, there must be a "clear and present danger to the bargaining process" in order to overcome "the burden on one who objects to the representatives selected by the other party." 412 F.2d at 520. The exceptions to the rule that parties can choose their representatives "freely" are those cases where a proposed representative is "infected with ill will . . . or conflict of interest," 412 F.2d at 517.

In the instant case, there is no contention that the unit employees who were present at the bargaining session of April 17, 1979, were disqualified by reason of ill will or conflict of interest, or that they would take some action that would frustrate the negotiations. Respondent's objections to the presence of the employees were that they were not truly "representatives" of the employees and that their presence would be embarrassing to Iscol if Fischer berated him during the session or made unreasonable demands. As to the first objection, the statement of the union president and of union counsel that the Union had asked the four employees to be present at the negotiations as part of the committee should have foreclosed any further inquiry by Iscol. The rank-and-file employees are not chargeable with knowledge of the legal definition of the term "representative." Their statements to Iscol that they were not representing the Union cannot overcome the fact that their presence had been requested by the Union and that they were there to observe and assist Fischer in negotiations in whatever way he should require. Further, Iscol's feeling that he did not want to risk being demeaned before his employees is not any justification for barring unit employees from the bargaining committee. Collective negotiations are often heated and unruly, and harsh words may be exchanged by the parties. There is no rule, nor has Respondent cited any, that unit employees may be barred from negotiations because the meetings are acrimonious and lack decorum, or because unreasonable demands may be made.

The cases cited by Respondent are not apposite. In *L. G. Everist, supra*, it was the employer which invited all rank-and-file employees to the negotiations against the wishes of the union. By so doing, it interfered with the right of the employees to bargain through representatives of their own choosing. And in *Booth Broadcasting, supra*, it was held that an employer violates Section 8(a)(5) and (1) of the Act when it refuses to bargain unless the union removes a certain person from the negotiations.

I find that by refusing to negotiate with the Union on April 17, 1979, in the presence of four unit employees who had been requested by the Union to attend the meeting and who were said by the Union to be on the committee, Respondent violated Section 8(a)(5) and (1) of the Act. *General Electric* v. *N.L.R.B., supra.*

E. *Refusal To Make New Proposals Since November 1979*

The parties stipulated that since November 8, 1979, and including that date, Respondent has made no new proposals in collective bargaining. After the meeting of November 8, 1979, the parties met for the purpose of negotiating on December 12, 1979, and on January 8 and February 7, 1980.

The General Counsel urges that Respondent's failure to make new proposals at any of these four sessions amounts to bad-faith bargaining and constitutes a violation of Section 8(a)(5) and (1) of the Act. Taken together with Respondent's alleged reduced wage proposal in February 1980, unilateral changes, and refusal to meet with the Union's representatives, the General Counsel contends that the failure to make new proposals demonstrates that Respondent intended never to reach agreement.[8] The General Counsel cites *N.L.R.B.* v. *Katz, supra; Southside Electric Cooperative, Inc.*, 243 NLRB 390 (1979); *Cal-Pacific Furniture Mfg. Co.*, 228 NLRB 1337 (1977); and *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395 (1952).

Respondent argues that the law does not require the making of a concession by a party to negotiations, and that good-faith bargaining may take place even where a party refuses to modify certain of its positions. Respondent points out that 30 or 35 bargaining sessions had been held by the parties through November 1979, and that many disputed items had been discussed and eventually resolved. Respondent contends that the General Counsel has not shown that Respondent did not enter into the discussions with an open mind.

Based on the evidence before me, I must find that the General Counsel has not shown why the failure of Respondent to make new proposals since November 1979 is a refusal to bargain in good faith. This is not a case where the employer's egregious conduct in committing numerous unfair labor practices lends significance to its failure to make new proposals after a certain time as in *Southside Electric Cooperative, Inc., supra.* Nor is it a case where the employer has refused to discuss a matter which is a mandatory subject of bargaining as in *Cal-Pacific Furniture Mfg. Co., supra.* Instead, the record shows that after numerous bargaining sessions in the course of which many subjects were discussed and agreed upon Respondent did not make any new proposals. Standing alone, this conduct, which otherwise stated is a refusal to make concessions, cannot be found to constitute a refusal to bargain. *American National Insurance Co., supra.* The General Counsel has not provided any further evidence nor made any argument to show why it was unreasonable or in bad faith for Respondent to cease making new proposals in November 1979. There has been no evidence presented which would tend to show that Respondent had an intention never to reach an agreement. I therefore find that Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to make new proposals since November 8, 1979.

F. *Refusal To Meet on January 23, 1980*

Fischer testified that on January 17, 1980, he and Iscol spoke on the telephone and Iscol informed him that he would not be available for a meeting scheduled to take place on January 23, 1980. Iscol proposed two new dates to Fischer, one in late January and one on February 7, 1980. Since Fischer was not available on the proposed day in January, the parties agreed to meet on February 7, 1980. Iscol testified that he was unable to meet because he had to be present at an NLRB investigation.

The General Counsel argues that "viewed in the context of the entire bargaining history" Respondent's actions amount to an avoidance of bargaining and "another opportunity to delay the bargaining process." I find no merit to this contention. In the course of a lengthy bargaining relationship it must be expected that a party will occasionally become unavailable to meet, and no nefarious intent need necessarily be ascribed to such occasions. Indeed, viewed in the light of the numerous previous meetings between the parties, the postponement to February 7, 1980, was *de minimis* and did not constitute a violation of the Act. *Charles E. Honaker*, 147 NLRB 1184, 1186 (1964); *Charles Manufacturing Company*, 245 NLRB 39 (1979).

G. *Changes in Method of Payment*

Throughout the course of negotiations between the Union and Respondent, the parties had alternated in making arrangements and in making payment for the sites at which the meetings were held. The Union had paid the costs of the meeting of December 12, 1979. The next meeting after this was scheduled for January 23, 1980. On January 14, 1980, counsel for the Union addressed a letter to Iscol reminding him of the next meeting date and stating: "The Union wishes to have the meeting at our offices, unless you have another location in Manhattan that you are willing to provide solely at your cost." On January 17, 1980, Iscol and Fischer spoke on the telephone. Iscol told Fischer that he was unable to meet on January 23, and the two agreed on a postponement until February 7, 1980, as is set forth in greater detail above. After this conversation, Iscol sent a mailgram to union counsel confirming the new date. In addition, the mailgram rejected the Union's offer to meet in the union offices and instead proposed a meeting at the offices of Weinick, Sanders, a location where the parties had met before. (Mr. Weinick, a CPA, is the father-in-law of Iscol. The Union later said that it welcomed his "re-entry" into the negotiations.) The mailgram states that Iscol had offered Fischer either the Weinick, Sanders, location or "split the cost of meeting at a neutral location." Iscol testified that he offered the location in response to union counsel's January 14 letter which proposed a meeting at the union office or else a location solely at Respondent's expense. The Weinick, Sanders, office, which had been used before, would have been solely at Respondent's expense. Iscol stated his belief that the Union was violating the agreed-upon method by rejecting Respondent's choice of location at Weinick, Sanders.

Fischer testified in a contradictory and incomplete manner. On direct examination, he testified that Iscol flatly refused to pay for a meeting place and offered instead to bear half the cost. On cross-examination, Fischer

[8] The General Counsel apparently refers to Fischer's testimony that Respondent reduced its proposed wage increase in February 1980. However, the parties stipulated that Respondent made no new proposals since November 8, 1979, and I am bound by that stipulation. The General Counsel was obviously aware of Fischer's testimony when the stipulation was entered into and must therefore be held to have waived consideration of any testimony which departs from the stipulation formulated by the parties. Thus, I will not consider Fischer's testimony concerning an alleged new proposal made in February 1980.

acknowledged that he himself had suggested that the parties meet at the FMCS without cost to either of them, and that he offered to arrange for the facilities to be made available. On redirect, Fischer volunteered that he had met Weinick, who was a "very fine gentleman," several times in the negotiations.

On January 22, 1980, counsel for the Union responded to Iscol's mailgram by stating, *inter alia*, that the use of Weinick, Sanders, was "unacceptable" and suggesting either state or Federal mediation offices. The parties eventually met at the offices of the Federal Mediation and Conciliation Service at no cost to either of them.

The picture that emerges from this fragmented testimony is as follows: It was Respondent's turn to pay for a meeting place but, for an unstated reason, the Union suggested meeting at its own offices. Respondent refused this suggestion and offered to adhere to the established practice by meeting at its expense at a location which had been used before and which it had reason to believe was more than satisfactory to the Union. For an unstated reason, the Union found this unacceptable and Fischer suggested the FMCS and offered to procure the space. The parties met at the FMCS. It is clear that it was not Respondent but the Union which attempted to change the agreed-upon method of arranging and paying for meeting places. Iscol offered to pay the entire cost of Weinick, Sanders, or half the cost of a neutral location. The latter suggestion was not unreasonable as the testimony shows that there had never before been a requirement that the parties meet at a neutral location. The General Counsel ignores the facts concerning Weinick, Sanders, when it argues that Respondent altered the previous methods in violation of Section 8(a)(5) and (1). I find that no violation of the Act occurred.

Conclusions of Law

1. Dilene Answering Service, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Telephone Answering and Communications Service Union, Local 780, Retail, Wholesale and Department Store Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act is all full-time and regular part-time employees employed by Respondent at its facility located at 49 South Main Street, Spring Valley, New York, excluding guards and supervisors as defined in the Act.

4. At all times material herein, United Telephone Answering and Communications Service Union, Local 780, Retail, Wholesale and Department Store Union, AFL–CIO, has been the exclusive collective-bargaining representative of the employees in the appropriate unit within the meaning of Section 9(a) of the Act.

5. By requiring that its employee remove a union button from her clothing Respondent restrained and coerced its employee in violation of Section 8(a)(1) of the Act.

6. By refusing to meet on April 17, 1979, with the representatives of its employees designated by Local 780, including unit employees on the negotiating committee, Respondent refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

7. No other violations of the Act were committed.

The Remedy

Having found that Dilene Answering Service, Inc., engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Respondent should be ordered to bargain on request with the representatives of its employees designated by Local 780 including any unit employees who may be members of the negotiating committee.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

The Respondent, Dilene Answering Service, Inc., Spring Valley, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Requiring its employees to remove union buttons from their clothing.

(b) Refusing to bargain collectively with the Union including unit employees on the negotiating committee as the exclusive collective-bargaining representative of its employees in the unit consisting of all full-time and regular part-time employees employed by Respondent at its facility located at 49 South Main Street, Spring Valley, New York, excluding guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Upon request, bargain collectively with United Telephone Answering and Communications Service Union, Local 780, Retail, Wholesale and Department Store, Union, AFL–CIO, including unit employees on the negotiating committee, as the exclusive bargaining representative of its employees in the appropriate unit.

(b) Post at its premises copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.